Gimrock Construction, Inc. *and* International Union of Operating Engineers, Local 487, AFL–CIO.
Cases 12–CA–20173 and 12–CA–20527

June 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 8, 2001, Administrative Law Judge Pargen Robertson issued the attached decision.* The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to the Respondent's exceptions, as well as a cross-exception and supporting brief. The Respondent additionally filed a motion to stay these proceedings, and the General Counsel filed a brief in opposition to that motion.

The National Labor Relations Board has considered the decision and the stipulated record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3] Additionally, inasmuch as the Board today has issued its decision in *Gimrock Construction*, 12-CA-17385, 344 NLRB 128 (2005), the pendency of which had served as the basis for the Respondent's motion to stay these proceedings, we find it unnecessary to rule on the Respondent's motion.

In the companion case, we rejected the Respondent's defense that the Union's bargaining demands were jurisdictional in nature. To the extent that the Respondent asserts the same defense here, we again reject it. Moreover, we agree with the judge that the stipulated record in this proceeding additionally fails to establish such a defense.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gimrock Construction, Inc., Hialeah Gardens, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).[4]

"(c) Within 14 days after service by the Region, post at its facility in Hialeah Gardens, Florida, copies of the attached notice.[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 1999."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

* On page 14, par. 2 of his decision, the judge designated "November 2, 1999" as the date from which the Respondent refused to meet and bargain with the Union, despite having correctly identified the date as October 27, 1999, in the Order and elsewhere in the decision. We have corrected that inadvertent error.

[1] In adopting the judge's findings, we emphasize that, through this decision, we make no determination regarding the substance of the parties' claims regarding the composition of the bargaining unit.

[2] The complaint in this case alleged violations of Sec. 8(a)(5) and (1) by the Respondent's actions in failing to provide requested relevant information and refusing to meet and bargain with the Union. Although the judge found that the Respondent had engaged in the conduct alleged, the judge inadvertently omitted a reference to Sec. 8(a)(5) in his Conclusions of Law. Accordingly, we modify the Conclusions of Law to correct the judge's inadvertent omission.

[3] We have substituted a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F. 3d 534 (6th Cir. 2004).

[4] We have corrected the judge's inadvertent reference to March 7, 1999—rather than May 7, 1999—as the date on which the first unfair labor practice occurred. See *Excel Container*, 325 NLRB 17 (1997).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with International Union of Operating Engineers, Local 487, AFL–CIO, as bargaining representative of the following described appropriate collective-bargaining unit, by refusing to provide the Union with information requested by the Union in letters dated May 7, June 14, and July 23, 1999, i.e., with payroll records and certified payroll records pertaining to work performed by Respondent for any governmental entity for the 3-year period prior to May 7, 1999, and the payroll records for all of our projects within the jurisdiction of the Union, for the period April 23 to July 23, 1999.

WE WILL NOT refuse to meet and bargain with the Union as bargaining agent of the employees in the following described appropriate bargaining unit:

> All equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, on request, furnish the Union with the information requested by the Union in letters of May 7, June 14, and July 23, 1999, including payroll and certified payroll records pertaining to work performed by Respondent for any governmental entity for the three years ending May 7, 1999, and payroll records for all of Respondent's projects within the geographical jurisdiction of the Union for the period April 23 to July 23, 1999.

WE WILL, on request, bargain with the Union as exclusive representative of the employees in the appropriate unit described above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

GIMROCK CONSTRUCTION, INC.

Arturo Royce, Esq., of Miami, Florida, for the General Counsel.
Donald T. Ryce, Esq., of Miami Beach, Florida, for the Respondent.
Kathleen M. Phillips, Esq., of Miami, Florida, for the Charging Party.

DECISION

This hearing was held on March 5, 2001, in Miami, Florida. The parties stipulated the record to the administrave law judge. All parties were represented and afforded full opportunity to be heard and to introduce evidence. Respondent and General Counsel filed briefs. Upon consideration of the entire record and the briefs, I make the following findings. Respondent admitted the filling of charges and the jurisdictional allegations including allegations that it is a Florida corporation with an office and place of business located in Hialeah Gardens, Florida, where it has been engaged as a contractor performing construction and marine related work; during the calendar year 1999 in the conduct of those business operations it purchased and received at its Florida facility and jobsites in Florida goods and materials valued in excess of $50,000 directly from points outside Florida; and it has been an employer engaged in commerce at material times. Respondent admitted that the charging party is a labor organization and it admitted the supervisory allegations. It also admitted that the following described bargaining unit does constitute an appropriate unit, that the Union was certified as collective-bargaining representative of that bargaining unit on March 20, 1995, and that the Union has been the exclusive collective-bargaining representative for those unit employees since March 3, 1995:

> All equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint alleged that Respondent unlawfully refused to furnish the Union relevant information requested by the Union on May 7, June 14, and July 23, 1999, and that Respondent has unlawfully failed and refused to meet and bargain with the Union since October 27, 1999.

From 1987 until 1995, Respondent and the Union agreed to collective-bargaining agreements under Section 8(f) of the Act. On January 26, 1995, the Union filed a petition for an election. The Regional Director approved a stipulation agreement on February 9 and the Union won an election held on March 3, 1995 (12–RC–7816). On March 20, 1995, the Union was certified as exclusive collective-bargaining representative of employees in the unit[1] described above.

The parties engaged in unsuccessful negotiations until July 1995 when negotiations stopped. Negotiations resumed in 1998 and Respondent wrote the Union advising that the Union's most recent contract proposal was the same it had offered on July 3, 1995. The Union replied on November 18 and agreed that what Respondent had was indeed its July 3, 1995 offer but that the Union would be submitting additional proposals. The Union did submit a proposal dated February 12, 1999 (S–10). The parties exchanged letters (S-11–15) and the Union filed an unfair labor practice charge against Respondent on April 26, 1999 (S–16). Respondent wrote the Union on April 30, 1999 and enclosed a counterproposal (S–17 (a) and (b)). The Union requested a negotiation meeting by letter dated May 3, 1999 (S–18) and filed another unfair labor practice charge against Respondent on May 7, 1999 (S–19). On May 7 the Union wrote

[1] See *Gimrock Construction, Inc*., 326 NLRB 401, 403 (1988). A copy of that decision is included in the parties'stipulated exhibits (S-5).

Respondent with the first of the three requests that allegedly constitute grounds for the instant unfair labor practices (S–20). The request that is relevant at this time follows:[2]

> (2) All payroll and certified payroll records pertaining to work performed by Gimrock for any governmental entity, including but not limited to, all Federal, State, County and local municipalities for the last three year period.

Respondent wrote the Union three letters on May 16 [S–21 (a), (b), and (c)]. As to the Union's May 7 request for information, Respondent replied:

> We do not understand why this demand is so broad. The company has never pleaded inability to pay, which is the only possible good-faith basis for such a far-reaching demand. Moreover, you seek extensive information outside of Dade and Monroe Counties, and therefore, beyond the scope of the bargaining unit. Please explain the relevance of the information you seek to your client's bargaining obligations to bargaining unit employees, and why you believe you are entitled to virtually all of the company's financial records even though the company's inability to pay is not an issue in negotiations.

Respondent wrote the Union on May 28 (S–22) stating that it is the Union's position that bargaining unit employees are entitled to exclusively perform work traditionally claimed by the Union such as operating backhoes and front-end loaders and that it was Respondent's position that the Union's certification did not constitute an award of that work. The Union wrote the second of its relevant letters on June 14 requesting information:

> Per my previous discussion with you at our meeting on May 27, 1999, the Union has requested previously documents pertinent to the current terms and conditions of employment at Gimrock. To date, we have not received that information, even though at the meeting you indicated that that would be forthcoming. To clarify, the Union is requesting the following information:
>
> 1. All documents reflecting the current terms and conditions of employment, including but not limited to health benefits, pension benefits, holiday benefits, vacation benefits, sick leave benefits, personal leave benefits, and any other sort of fringe benefits currently in effect.
>
> 2. Payroll records covering all projects within the geographic jurisdiction of Local 487.
>
> 3. A listing of all current employees within the geographic jurisdiction indicating their wage rate, classifications and applicable benefits.
>
> 4. A listing of all holidays currently observed by Gimrock, indicating whether they are paid or unpaid.
>
> 5. Information supporting Gimrock's claim that the administrative cost of check off is $.25 per check. In addition, please identify any and all other entities who currently are allowed deduction status.[3]
>
> 6. A copy of the Summary Plan Description of any and all Pension or Welfare programs currently in effect.

Respondent's attorney replied on June 28 that he had just returned from a trip out of the country. He indicated that he understood the Union's June 14 demand for information replaced its earlier demand submitted in May; and he stated his availability to meet on certain dates for negotiations and that he had not received a response from his May 28 letter to the Union. Respondent submitted a wage proposal on July 16. On July 19 Respondent wrote the Union in response to its June 14 request for information:

> . . . I believe that you have been supplied with all relevant information relating to Request Nos. 1, 4, and 6, or alternatively have been informed when no such information exists. Inasmuch as Gimrock has dropped its proposal that the Union reimburse it for check-off deductions, Request No. 5 is no longer relevant to the negotiations.
>
> That leaves Request Nos. 2 and 3. Regarding Request No. 3, you have been given a list of current bargaining unit employees along with their wage rates and classifications, and have otherwise been told of their benefits. Although the remainder of Request No. 3 relates to non-bargaining unit employees, I believe the request for other information may be somewhat relevant.
>
> However, regarding Request No. 2, requesting "payroll records covering all projects within the geographic jurisdiction of Local 487," I believe this is relevant only with respect to bargaining unit employees, and not otherwise. Moreover, there are no date limitations on this request. Therefore, I need clarification of this part of the request as to what you intended.[4]
>
> Finally, you still have not responded to my letter of May 28, 1999. Please give me you position on the issues discussed in that letter immediately, as this bears directly on the course and scope of the current negotiations.

On July 21 Respondent's attorney wrote the attorney for the Union that he was enclosing "the list of non-bargaining unit employees employed by Gimrock in the Miami-Dade County and/or Monroe County area, their job classification, and wage rates" (S–28 (a)).

There was a meeting on July 22 involving Respondent's attorney, its comptroller and the Union represented by its attorney, Waters and Albritton. Among other things, Respondent's attorney informed the Union "he did not regard the Respondent's proposal which he saw as a continuation of the company's past practice regarding work assignments as an attempt to modify the bargaining unit. [Respondent's attorney] maintained that Respondent had always used nonunion construction specialists to perform work requiring them to use all of Respondent's equipment—with the exception of cranes and yard

[2] The Union withdrew a request for financial information after Respondent explained it had never claimed an inability to pay. The Union modified its request for payroll and certified payroll records to include only records for jobs in Dade and Monroe counties, and orally requested a list of employees the Respondent regarded as being in the bargaining unit with all information regarding their fringe benefits, job classifications, and wage rates (stipulation, par. 19, 3d par. p. 4).

[3] In a July 9 negotiation session, Respondent explained that it would not seek the reasonable costs of deducting union dues and the Union withdrew its request for information regarding the administrative cost associated with a checkoff and the identity of all other entities allowed deduction status by Respondent. Respondent outlined its employee benefits in that meeting (see stipulation, p. 5, par. 23).

[4] The Union attorney replied to the request for date limitations, in its July 23 letter to Respondent (S–30). The Union limited that request to the last 3 months of payroll records of all employees of Gimrock.

cranes used in the production process—and that its nonunion field mechanics had always maintained and repaired all of the Respondent's equipment, and that, therefore, this work was not bargaining unit work. . . ." (stipulation, par. 27, p. 6.)

The Union's attorney wrote Respondent's attorney on July 23 (S–30):

> As you recall I previously requested information pertinent to these negotiations by letter dated June 14. [Footnote omitted] with respect to the information requested, you have only partially responded. To follow is my original request, with annotations indicating whether they have been fully responded to: All documents reflecting the current terms and conditions of employment, including but not limited to health benefits, pension benefits, holiday benefits, vacation benefits, sick leave benefits, personal leave benefits, and any other sort of fringe benefits currently in effect.
>
> 1. Payroll records covering all projects within the geographic jurisdiction of Local 487. *This information has not been provided. To clarify, we wish to have the last three months of payroll records of all employees of Gimrock.*
>
> 2. A listing of all current employees within the geographic jurisdiction indicating their wage rate, classifications and applicable benefits. *You have provided a list, which purports to be classifications of employees although we have doubts as to the classifications listed.*
>
> 3. A listing of all holidays currently observed by Gimrock, indicating whether they are paid or unpaid. *This information has been provided as revised today.*
>
> 4. Information supporting Gimrock's claim that the administrative cost of check off is $.25 per check. In addition, please identify any and all other entities who currently are allowed deduction status. *This information is no longer requested in view of Gimrock's withdrawal of the proposed charge.*
>
> 5. A copy of the Summary Plan Description of any and all Pension or Welfare programs currently in effect. *You have indicated that there is currently no pension or welfare plan in effect.*
>
> In addition, as you know, on *May 7, 1999*, we requested the following: All payroll and certified payroll records pertaining to work performed by Gimrock for any governmental entity, including but not limited to all Federal, State, County and local municipalities for the last three year period.
>
> To date that information has not been forthcoming. You indicated that somehow we confused you and had changed our request from payroll to certified payroll. As you can see, we requested both.
>
> With respect to your suggestion that we are entitled to only the information with respect to bargaining unit employees, you are wrong. Given the twist you have put on the term "bargaining unit employees," we are in need of and demand the records with respect to all employees.
>
> With regard to the misstatements contained in your letters of May 28 and June 1, I find it difficult to contain my outrage. You are well aware that the union has always taken the position that the employer may place who it will into the positions covered by the certification. However when those individuals perform work covered by the certification, then they will perform that work under the terms and conditions which we negotiate. We do not subscribe to your view that the bargaining unit is one defined by individual names, but rather by those persons performing work within the trade identified in the certification. In future please do not misstate our position.
>
> Because you have completely confused the issue, we are interested in hearing the method by which you chose to identify the persons on your list as being "equipment operators". Please identify the criteria you use. We look forward to an explanation of your "position" with respect to the identity of the bargaining unit.

By letters dated July 27 (S–31) and August 13 (S–33), Respondent wrote the Union requesting an understanding of the Union's position regarding its claim for "bargaining unit work." Among other things Respondent stated at page 2 of its August 13 letter, "we are willing to submit to you the payroll records of those persons we identified as belonging to the bargaining unit. Regarding the rest of your demand, we are not willing to turn over the payroll records of non–bargaining unit employees until you explain why this information is relevant. If you claim the information is relevant to determine who is in the bargaining unit, then you need to answer the questions I raised in my letter of July 27. . . ."

The Union responded on August 16 (S–34) and October 18 (S–35).

Respondent wrote the Union on October 27, 1999. The letter included the following closing paragraph:

> To summarize, the parties have agreed to proposed contract language on every substantive issue with the exception of the trust fund provisions, the hiring hall language, and the bargaining unit's work jurisdiction. We are clearly at impasse over the trust fund and hiring hall provisions. We are totally at odds regarding the appropriate scope of the certification and of any work jurisdiction clause, in light of the Union's position that the certification constituted a jurisdictional award, and because of the Union's unyielding demand to negotiate on behalf of anyone who performs work covered by the International's constitution, no matter how seldom or irregularly. Therefore, nothing can be gained by scheduling yet another bargaining session, when the parties are at impasse on every unresolved issue.

The Union replied to Respondent's October 27 letter on November 2 and 19, 1999 (S–37, 38). The November 19 letter included another request for the previously requested information. Respondent wrote on November 22. In that letter Respondent rejected the Union's proposal for an exclusive hiring hall arrangement. Respondent stated that it would not provide the Union with its requested payroll information because the Union had continually tied its information requests to its illegal demand to bargain on behalf of anyone performing bargaining unit work regardless of how seldom or irregularly they perform that work (S–39).

The Union filed the charge in case 12–CA–20527 on December 1 and the parties have not engaged in negotiations or an exchange of letters since November 22.

FINDINGS

Credibility

The parties stipulated the full record. There were no witnesses presented during the hearing and no credibility resolutions are required.

Conclusions

General Counsel alleged that Respondent has engaged in unfair labor practices by refusing to furnish the Union with payroll records and certified payroll records pertaining to work performed by Respondent for any governmental entity for the three year period prior to May 7, 1999; by refusing to furnish the Union payroll records for all of Respondent's projects within the geographical jurisdiction of the Union for the period April 23 to July 23, 1999; and by refusing to meet and bargain with the Union because of its unlawful claim of impasse.

> (a) Refusing to furnish the Union with payroll records and certified payroll records pertaining to work performed by Respondent for any governmental entity for the 3–year period prior to May 7, 1999.
>
> (b) Refusing to furnish the Union payroll records for all of Respondent's projects within the geographical jurisdiction of the Union for the period April 23 to July 23, 1999.

The relevant letters, which are included in the stipulated documents as S-20, S-23, and S-30, show the Union's requests. Moreover, as shown above, there is no dispute but that Respondent refused to supply the Union with some information it requested. Respondent's defense to the Union's requests and its defense to the unfair labor practice allegations, rest on the issue of relevancy.[5] Here, I must question whether the requested information is relevant to the Union's role as exclusive collective-bargaining representative.

It is important to keep in mind that the allegations here are not that Respondent refused to meet and bargain about the appropriate bargaining unit. Instead, the question at issue (i.e., whether an employer must supply the union with information) is not so complex. Indeed the principles are simple. An employer has an obligation "to provide information that is needed by the bargaining representative for the proper performance of its duties." (*NLRB v. Acme Industrial, Co.*, 385 U.S. 432, 435, 436 (1967)) Certain information is considered so intrinsic to the core of the employer-employee relationship as to be presumptively relevant (*Electrical Workers IBEW v. NLRB*, 648 F.2d 18, 24 (D.C. Cir. 1980). The Union's requests including Respondent's employees in Dade and Monroe counties in Florida involves information intrinsic to the core of the employer–employee relationship and is presumptively relevant.[6] Only in situations where requested information pertains to employees outside the bargaining unit, is the union required to show relevancy. In those situations a union must show only probable or potential relevancy (*Temple–Eastex, Inc*., 228 NLRB 203 (1977); *Depository Trust Co.*, 300 NLRB 700 (1990)).

As shown above, before the Union was certified in 1995, the Union furnished the Respondent with employees through its hiring hall pursuant to an 8(f) agreement with Respondent. From 1995 there was a defined certified bargaining unit, but the parties have never reached agreement. The parties have never agreed on which employees are in or out of the bargaining unit.

The problem at hand first surfaced when the Union made a contract proposal on February 12, 1999. That proposal included the following provision:

> *Article IV, Work Classification Defined,*
> The parties recognize that the Employer has an established past practice, essential to its economic viability, of using non–bargaining unit employees to perform work on the following type of equipment: boring machines, pumps, air compressors, trucks, welding machines, boats (tugs, etc.), and similar items. With respect to yard cranes, only production work will be considered bargaining unit work. Notwithstanding the fact that certain of this work is listed in the wage rate provisions of this Agreement, the parties agree that the Employer maintain its past practice as described herein without violating this Agreement or giving rise to a claim for fringe benefits by the Apprenticeship, Health & Welfare, and Pension Funds. To the extent such work is performed by the non–bargaining unit personnel, said work shall not be considered as falling with the provisions of this Agreement. To avoid confusion, the parties will agree to maintain at all times a list of bargaining unit employees.

After exchanging letters including contract proposals from the Union, Respondent submitted a counterproposal on April 30, 1999. Among other things, that proposal included the following:

> *Article IV, Work Classifications Defined,*
> The parties recognize that the Employer has an established past practice, essential to its economic viability, of using non–bargaining unit employees to operate, repair, maintain and work the following types of equipment: boring machines, pumps, air compressors, trucks, welding machines, boats (tugs, etc.), cranes, derricks, derrick barges, and similar items. Only the operation of cranes at job sites and of yard cranes to perform production work have traditionally been performed exclusively by Employees covered by this agreement. To the extent such work, other than the operation of job site cranes and of yard cranes to perform production work, is performed by non–bargaining unit personnel, said work shall not be considered as falling within the provisions of this Agreement. To avoid confusion, the parties will agree to and maintain at all times a list of bargaining unit employees, which will be considered conclusive as to the identity of employees covered by this agreement.

On May 7 the Union filed unfair labor practice charges[7] against Respondent alleging it violated section 8(a)(5) by improperly submitting a bargaining proposal that sought to revise the bargaining unit and it wrote Respondent requesting information (see S-20). In pertinent part that May 7 letter requested payroll and certified payroll records of Gimrock employees on any governmental jobs for the 3 preceding years.

Among other things during a May 27 negotiation session, the "parties disagreed as to whether the Union had acquired the

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[5] The key question in determining whether information must be produced is one of relevance. *Emeryville Research Center v. NLRB*, 441 F.2d 883 (9th Cir. 1971).

[6] Keep in mind that the bargaining unit includes:
> All equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

[7] Case 12–CA–20123.

right through its certification as representative of all equipment operators to represent any and all employees who operated backhoes, front-end loaders and bulldozers for Gimrock in Dade and Monroe counties." "The parties also disagreed over whether the Union was the exclusive collective-bargaining representative of all mechanics working for Gimrock on equipment operated by its equipment operators in Dade and Monroe counties (stipulation par. 19)."

During a July 9 negotiation session Respondent informed the Union that it only employed five or six bargaining unit employees and Respondent asked the Union if it was claiming entitlement to represent employees regardless of how little time they spent performing work claimed by the Union to be bargaining unit work. The Union replied, "the Union considered anyone who performed work covered by the certification to be in the bargaining unit while performing that work (stipulation par. 23)." During a July 22 negotiation session the "parties once again advanced their respective positions as to the proper scope and composition of the appropriate unit certified in Case 12–RC–7816. "The Union . . . responded that whomever performed bargaining unit work should be covered by the contract whenever they performed that work." The Union stated that given "the Respondent's position on the composition of the Unit the Union needed the information from the company's payroll records to determine how Gimrock classified its own employees (stipulation par. 27)."

The "parties respective positions as to the composition of the bargaining unit were once again discussed at (the September 28) bargaining session. . . . . The Union specifically asked the Respondent to provide the payroll information it had previously requested. The Respondent agreed to speak to the company about providing certified payroll records (stipulation par. 33, 3d paragraph)."

On October 27 Respondent wrote the Union that after "considering the work performed by the Union's employees who were in the bargaining unit at the time of the election, it had concluded that the Union represented two additional employees to the crane operators the Respondent had identified in its letter of July 16, 1999 as being the only current bargaining unit employees (stipulation par. 35)." On November 2 the Union wrote Respondent disavowing that the Union was treating the certification an 'award of work'. (stipulation par. 36)."

On November 22 Respondent wrote the union that it "would not provide payroll information requested by the Union because the Union had 'continually tied (its) information requests to (its) illegal demand to bargain on behalf of anyone performing what (it) consider(ed) to be 'bargaining unit work', regardless of how seldom or irregularly they performed the work (stipulation par. 38)." "Since May 7, 1999, the Respondent has refused to furnish the Union with all payroll records and certified payroll records pertaining to work performed by Respondent for any governmental entity, including but not limited to all Federal, State, County and local municipalities for the previous 3-year period prior to May 7, 1999 (stipulation par. 40)." "Since June 14, 1999, the Respondent has refused to furnish the Union payroll records for all of Respondent's projects within the geographical jurisdiction of the Union for the period April 23, 1999 to July 23, 1999 (stipulation par. 41)."

The Union has shown probable or potential relevancy under the circumstances, by informing Respondent[8] that the records are necessary to consider Respondent's claim that many of its employees that appear in the unit, are outside the unit.

The Board uses a broad, discovery-type standard in determining the relevance of an information request and the Board's only function is in acting upon the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities (e.g., *Bell Telephone Laboratories*, 317 NLRB 802 (1995)). Here, the relevant issue during negotiations concerned which employees were included in the certified collective-bargaining unit. There are some employees that are obviously not included in the unit. For example those employees that are not working in Dade and Monroe counties in Florida, and those employees that are specifically excluded by the unit description.[9] However, it is clear from the record that the excluded employees were never the subject of dispute. Moreover, even though there was some discussion about employees working in sites outside Dade and Monroe counties, it is clear that the relevant disagreement dealt with which "equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida," were in or out of the unit.[10] Regardless of whether the Union prevails on the issue of inclusion or exclusion from the unit, information pertaining to employees involved in that discussion is relevant and necessary to the Union's function of negotiating a collective-bargaining agreement. "The Board does not judge the merits of the grievance. It judges only whether the requested information is relevant." See *WTO–LA Molding Co.*, 272 NLRB 1239, 1240 (1984), cited in *Bell Telephone Laboratories*, supra.

Respondent argued that the Union had the burden of showing relevancy of the requested records in view of its requests including employees that were outside the unit. However, the outstanding issue during negotiations involved Dade and Monroe county employees that were not excluded by the certified unit description. Although Respondent did complain that the Union's requests included employees outside Dade and Monroe counties, the discussions during negotiations showed that the parties understood that the dispute involved employees in Dade and Monroe counties and the Union was seeking records to enable it to completely considered the matter in dispute. That dispute was clear from the time Respondent replied to the Union's February 12 "*Article IV, Work Classification Defined*" proposal with its own proposal of that clause on April 30. The parties were arguing about Respondent's proposal to exclude employees that "operate, repair, maintain and work the following types of equipment: boring machines, pumps, air compressors, trucks, welding machines, boats (tugs, etc.), cranes, der-

[8] However, the Union is not required to adequately inform the employer as to the basis of its request (*Amphlett Printing Co.*, 237 NLRB 955 (1978).

[9] The unit description specifically excludes from the unit, all office clerical employees, professional employees, guards and supervisors as defined in the Act.

[10] See, for example, the discussion at stipulation, para. 27, 3d par., p. 7, during the July 22 bargaining session where the Union asked for the information it had requested in order to determine how Gimrock classified its own employees. Respondent replied that the only employees to be included in the bargaining unit were crane operators, and no backhoe operators or front-end loaders. The Union stated that it should have the payroll records to the classifications in the certification to determine who was in the bargaining unit.

ricks, derrick barges, and similar items." The Union opposed excluding anyone other than those excluded by the certification but did agreed that Respondent could use nonunit employees to "perform work on the following types of equipment: boring machines, pumps, air compressors, trucks, welding machines, boats (tugs, etc.), and similar items." The certified unit appears to include those sought by the Union and because of Respondent's submission to the Union, lists of employees it considered unit employees and its positions during the negotiations, the Union sought records that would show how Respondent classified its employees both within and without the unit. The Union argued that was necessary to fully consider Respondent's argument as to exclusion of certain operators and maintenance employees.

Respondent offered requested records for some of its employees in Dade and Monroe counties. It contended that I must consider its reasons for nondisclosure and the negotiating conduct of the parties. As shown herein, I have considered those matters. As to the former, Respondent never claimed that the records were confidential or that they could not be disclosed for any reason other than its contention that the records were not relevant in that they involved nonbargaining unit employees. However, as shown herein, the parties never agreed on which employees were in the bargaining unit and Respondent's argument is based to some extent, on the premise that its opinion, as to which employees are in the unit, should be conclusive. I disagree. The Union's position regarding inclusion in the unit is, at the very least, an arguable one and the Union should have the opportunity to examine those records.

Respondent also contended that the Union had an obligation to justify its position that the bargaining unit should not have been limited to those employees that performed work under the 8(f) contracts before 1995. However, the records showed that the certified unit included employees in Dade and Monroe counties and was not restricted by prior agreements. Nevertheless, the Union wrote Respondent on February 12, 1999, and offered to further limit the bargaining unit beyond what was specified in the certification, and to permit the use of nonbargaining unit employees in certain jobs. Respondent sought additional limitations on the bargaining unit and the parties never reached agreement on that issue. That evidence shows that the records sought by the Union regarding work in Dade and Monroe counties was relevant. Respondent argued that the Union's insistence on including nonbargaining unit employees within the scope of negotiations amounts to insistence on bargaining over an inappropriate unit. The record shows that was not the case. The unit sought by the Union appeared to fall well within the scope of the certified unit description and there was no showing that the Union ever sought to include any employee that was excluded by the unit definition.

Respondent also contended that the Union failed to explain why it was in need of the records with respect to all employees. However, an examination of the stipulated record shows that the Union was requesting records that would enable it to investigate Respondent's claim for a more limited bargaining unit. On July 23 the Union set out that point in a letter to Respondent where it stated that, "given the twist you (Respondent) have put on the term bargaining unit employees, we (the Union) are in need of and demand the records with respect to all employees." Even if I should accept Respondent's contention that the Union delayed 2 months in explaining why it needed records of all Respondent's employees, the record shows that the Union did explain its position on July 23 but that Respondent continued to refuse to supply the requested records.

Respondent contended that the Union misapprehended the effect of the Board certification of it as bargaining representative and that the certification was not a jurisdictional award. However, the record showed confusion arising from Respondent's contention that the Union's role was limited by its role under the pre-1995 prehire agreements. Under the certification the Union became the exclusive representative for all employees included in the bargaining unit regardless of whether a particular employee had selected the Union. Although the Union expressed willingness on February 12 to allow the Respondent to use nonunit employees to perform certain work, the parties never reached agreement on that matter and the Union never relinquished its right to investigate Respondent's efforts to limit the size of the unit. From the certification the Union was the representative of all employees in the bargaining unit. As shown above that unit included all equipment operators and equipment mechanics in Dade and Monroe counties. It is true that the Union referred to its constitution during its discussions with Respondent as to which employees should be included in the bargaining unit. However, that did not convert this matter into a jurisdictional question. This was never a case of two or more unions contesting work performed by members from those unions. Here, union membership or the capability to perform traditional work was not an issue. The issue was the parties' obligations under the law to bargain regarding employees in the certified unit regardless of whether any or all those employees were Union members. Respondent cited *Operating Engineers (Building Contractors Association of New Jersey)*, 118 NLRB 978 (1957) among other cases. However, that case, unlike this one, involved a jurisdictional question under section 10(k) involving employees of several unions. Here, the Union was the only certified bargaining representative of Respondent's employees in Dade and Monroe counties other than those specifically excluded.

Respondent cited *Viacom Cablevision*, 268 NLRB 633 (1984) in contending that the Union only represented those employees with specific job classifications at the time of the consent election stipulation in 1995. That case, unlike this one, dealt with challenged ballots in a representation proceeding. There the question was whether an employee that had voted under challenge, was a member of the bargaining unit and eligible to vote. The Board found that the challenged voter was not a member of the unit. Here, the record shows no such contest. There was no question regarding challenged ballots or anything else involving representation proceedings. Moreover, the question here is not whether certain employees should or should not be included in the bargaining unit. Instead it is a question of whether the Employer is obligated to furnish the Union with information relevant to the Union's investigation of that question.

Here, at issue was a question of bargaining and the Union showed from at least February 12, 1999, that it was willing to negotiate regarding excluding certain employees from the bargaining unit. The instant problem stems from Respondent's refusal to provide the Union with information that would have permitted the Union to investigate inclusion or exclusion of employees that fell within the inclusion provisions of the certified bargaining unit. Respondent argued that job titles have changed since the parties consented to an election in 1995. However, questions involved in job titles which may have been

other than those contemplated at the time of the consent stipulation, is something that is best handled in negotiations between the parties. In order to engage in such negotiations, the parties need to prepare themselves through examination of relevant documents. The Union was precluded from engaging in complete investigation by the refusal of Respondent to produce the requested, relevant, records.

I find that Respondent unlawfully refused to provide the Union with information pursuant to requests from the Union.

Refusing to meet and bargain with the Union because of its unlawful claim of impasse.

"Respondent has refused, since on or about October 27, 1999, to meet and bargain with the Union as the exclusive collective-bargaining representative of the Unit (stipulation par. 42)." The Board has recognized that a legal impasse cannot exist where the employer has unlawfully failed to supply relevant information *(United States Testing Co.*, 324 NLRB 854, at 859 (19997); *Decker Coal Co*., 301 NLRB 729, 740 (1991)).

Here the very essence of the Union's obligation was left in the air by Respondent's refusal to supply the Union with relevant records necessary to consider which employees were included in the bargaining unit. Respondent argued to the Union that it should accept Respondent's determination as to which employees were included in the unit, even though Respondent's unit description did not include all its employees described in the certification. The Union was prevented from fully exploring Respondent's claimed unit limitation without full access to relevant records.

While continuing to refuse to supply information Respondent, from November 2, 1999, refused to meet and bargain with the Union. Among other things, Respondent continuously hindered the negotiations by insisting that the bargaining unit was other than that proposed by the Union and other than that described in the certification. Moreover, the record failed to show that the parties could not have reached agreement on a contract involving the certified bargaining unit. The most significant outstanding issue on November 2, was that regarding the bargaining unit and, as to that issue, the record showed that Respondent refused to bargain with the Union about employees in the certified unit and that Respondent refused to supply the Union with requested documents relevant to which employees should be included in the certified bargaining unit.

CONCLUSIONS OF LAW

1. Gimrock Construction, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2 .International Union of Operating Engineers, Local Union 487, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent by failing and refusing to provide the Union with relevant information and by refusing to meet and bargain with the Union as exclusive collective-bargaining representative in the following described bargaining unit engaged in activity violative of section 8(a)(1) of the Act:

> All equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [11]

ORDER

The Respondent, Gimrock Construction, Inc., Hialeah Gardens, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Union as exclusive representative of employees in the below described appropriate collective-bargaining unit, by refusing to provide the Union with information requested by letters of May 7, June 14, and July 23, 1999, including payroll and certified payroll records pertaining to work performed by Respondent for any governmental entity for the 3-year period prior to May 7, 1999, and payroll records for all of Respondent's projects in Dade and Monroe counties in Florida for the period April 23 to July 23, 1999.

(b) Refusing to bargain in good faith with the Union as exclusive representative of employees in the below described appropriate collective-bargaining unit, by failing and refusing to meet and bargain with the Union since October 27, 1999:

> All equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Supply the Union with information requested by the Union on May 7, June 14, and July 23, 1999, which information is relevant to the Union in its role as exclusive collective-bargaining representative of the employees in the above described bargaining unit.

(b) On request, meet and bargain with International Union of Operating Engineers, Local Union 487, AFL–CIO, as the exclusive collective-bargaining representative of its employees in the above mentioned appropriate collective bargaining unit and if an agreement is reached, reduce to writing and sign that agreement.

(c) Within 14 days after service by the Region, post at its facility in Hialeah Gardens, Florida, copies of the attached notice.[12] Copies of the notice, on forms provided by the Regional

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 1999.

(d) Within 21 days after service by the Region, file with the Regional Director, Region 12, a sworn certification of a responsible official on a from provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. June 8, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with International Union of Operating Engineers, Local 487, AFL–CIO, as bargaining representative of the following described appropriate collective-bargaining unit, by refusing to provide the Union with information requested by the Union in letters dated May 7, June 14, and July 23, 1999, i.e., with payroll records and certified payroll records pertaining to work performed by Respondent for any governmental entity for the 3-year period prior to May 7, 1999, and the payroll records for all our projects within the jurisdiction of the Union, for the period April 23 to July 23, 1999.

WE WILL NOT refuse to meet and bargain with the Union as bargaining agent of the employees in the following described appropriate bargaining unit:

> All equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by section 7 of the National Labor Relations Act.

WE WILL, on request, furnish the Union with the information requested by the Union in letters of May 7, June 14 and July 23, 1999, including payroll and certified payroll records pertaining to work performed by Respondent for any governmental entity for the 3 years ending May 7, 1999, and payroll records for all of Respondent's projects within the geographical jurisdiction of the Union for the period April 23 to July 23, 1999.

WE WILL**,** on request, bargain with the Union as exclusive representative of the employees in the appropriate unit described above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

GIMROCK CONSTRUCTION, INC.

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ment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."